STATE OF MICHIGAN

COURT OF APPEALS

BEVERLY JOAN MCELDOWNEY, Personal Representative of the Estate of RUSSELL MCELDOWNEY,

Plaintiff-Appellant,

v

AIR PRODUCTS & CHEMICALS, INC., AMERICAN CHEMISTRY COUNCIL, GOODRICH CORPORATION, PPG INDUSTRIES, INC., SHELL OIL COMPANY, UNIROYAL, INC., DOW CHEMICAL COMPANY, ALLIED SIGNAL, INC., a/k/a HONEYWELL INTERNATIONAL, INC., RHONE-POULENC, INC., a/k/a BAYER CROPSCIENCE, INC., UNION CARBIDE CORPORATION, ETHYL CORPORATION, GENCORP, INC., GEORGIA PACIFIC CORPORATION, GOODYEAR TIRE & RUBBER COMPANY, MONSANTO CORPORATION, PACTIVE CORPORATION, TENNECO AUTOMOTIVE, INC., and BORDEN CHEMICAL, INC.,

Defendants-Appellees,

and

ZENECA, INC., and CHEVRON USA, INC.,

Defendants.

UNPUBLISHED
May 31, 2007

No. 273572
Oakland Circuit Court
LC No. 2006-073263-NP

Before: Talbot, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition, pursuant to MCR 2.116(C)(8), to defendants. We affirm in part, reverse in part, and remand for further proceedings on plaintiff's product liability claims against the manufacturer/supplier defendants.

Plaintiff filed a complaint against defendants based upon their purported roles in the wrongful death of her husband. Plaintiff alleged that certain of the defendants had manufactured or supplied products containing vinyl chloride and other chemicals and products containing vinyl chloride and that they, along with other defendants, knowingly concealed the health hazards associated with vinyl chloride, including the risk of angiosarcoma (a type of liver cancer). According to plaintiff, her husband's exposure to products containing vinyl chloride at his place of employment caused him to develop angiosarcoma and ultimately die from such condition. Plaintiff thus sought recovery (including punitive damages) from defendants based upon products liability (design defects, failure to warn), breach of implied warranties, fraud, conspiracy, and aiding and abetting.

Defendants filed motions to dismiss/for summary disposition, claiming that plaintiff's pleadings were insufficient to establish a claim upon which relief could be granted. The trial court agreed, granting defendants' motions pursuant to MCR 2.116(C)(8) and dismissing plaintiff's complaint.

We review de novo the trial court's grant of summary disposition pursuant to MCR 2.116(C)(8). *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under this subrule tests the legal sufficiency of plaintiff's complaint on the pleadings alone. *Id.* at 119-120. In assessing a motion brought under MCR 2.116(C)(8), all factual allegations are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. *Radtke v Everett*, 442 Mich 368, 373; 501 NW2d 155 (1993). The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992).

Plaintiff first contends that the trial court erred in dismissing her complaint based on her supposed failure to link her husband's illness and death to any of defendants by identifying the specific product and its manufacturer. We agree.

"A prima facie products liability case consists of proof (1) that the defendant has supplied a defective product and (2) that this defect has caused injury to the plaintiff." *Mascarenas v Union Carbide Corp*, 196 Mich App 240, 249; 492 NW2d 512 (1992), citing *Johnson v Chrysler Corp*, 74 Mich App 532, 537; 254 NW2d 569 (1977). In the subcategory of asbestos litigation in product liability cases, our Supreme Court has held that a plaintiff is required to establish his or her exposure to the harmful agent as part of his or her burden of proof. "[A] plaintiff cannot establish the requisite connection between his injury and a particular asbestos product manufacturer by merely showing that the asbestos manufacturer's product was present somewhere at his place of work." *Mascarenas, supra* at 249, citing *Roberts v Owens-Corning Fiberglas Corp*, 726 F Supp 172, 174 (ED Mich, 1989).

It is true that "the threshold requirement of any products liability action is identification of the injury-causing product and its manufacturer. The plaintiff must produce evidence of a defect which caused the accident and trace that defect into the hands of the defendant." *Abel v Eli Lilly and Co*, 418 Mich 311, 324-325; 343 NW2d 164 (1984)(internal citations omitted). However, this action was not dismissed based upon lack of evidence. Indeed, evidence is generally identified and provided during discovery. Where, as here, the motion was based upon MCR 2.116(C)(8) the court looks to the pleadings alone and does not concern itself with evidence.

Plaintiff correctly argues on appeal that the trial court did not accept as true her factual allegations. Rather, the court determined that plaintiff's failure to identify a specific product precluded the forward progress of the litigation. Plaintiff may indeed have to discover the name of the product(s) and their manufacturer(s) in order to bring her claim to trial, but under *Wade*, a motion for summary disposition under MCR 2.116(C)(8) should only be granted when no factual development could justify a right of recovery. *Id.* That is not true in the instant case; indeed, it is possible that after discovery, plaintiff would be able to identify the name of the specific product her husband worked with that allegedly caused him to develop cancer, and the approximate time period of his exposure. As no discovery has yet taken place, summary disposition as to the manufacturer/suppliers of products containing vinyl chloride would be premature.

Moreover, this Court has observed complaints must "contain a 'statement of the facts' and the 'specific allegations necessary reasonably to inform the adverse party of the nature of the claims' against it." *Nationsbanc Mortgage Corp of Georgia v Luptak*, 243 Mich App 560, 566; 625 NW2d 385 (2000), quoting MCL 2.111(B). More generally, "the primary function of a pleading in Michigan is to give notice of the nature of the claim or defense sufficient to permit the opposite party to take a responsive position." *Stanke v State Farm Mut Automobile Ins Co*, 200 Mich App 307, 317; 503 NW2d 758 (1993), citing 1 Martin, Dean & Webster, Michigan Court Rules Practice, p 186. As plaintiff's complaint sufficiently states that decedent died as a result of exposure at his workplace to products containing vinyl chloride and that certain defendants manufactured or supplied products containing vinyl chloride to his workplace, defendants are on notice of the nature of plaintiff's claims against them. Therefore, the trial court erred by granting defendants' motion for summary disposition as to plaintiff's product liability claims against the manufacturers/suppliers of products containing vinyl chloride.

As to the defendants plaintiff identifies as "conspiring defendants," however, summary disposition would be appropriate pursuant to MCR 2.116(C)(8). As noted, *supra*, a threshold requirement in a products liability action is the identification of "the injury-causing product and its manufacturer." *Mascarenas, supra* at 249. In plaintiff's complaint, 15 of the named defendants are specifically not categorized as manufacturers and are referred to only as "conspiring defendants." Because the plaintiff has not identified these defendants as manufacturers, the allegations regarding these defendants are clearly insufficient and require dismissal.

Plaintiff next argues that the trial court erred by dismissing her claim of fraud against defendants. We disagree. Under Michigan law, in order to state a claim of fraud, a plaintiff must plead

> (1) that the charged party made a material representation; (2) that it was false; (3) that when he or she made it he or she knew it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he or she made it with the intention that it should be acted upon by the other party; (5) that the other party acted in reliance upon it; and (6) that the other party thereby suffered injury. [*Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 253 n 8; 701 NW2d 144 (2005).]

Plaintiff argues that her complaint set forth all the required elements, while defendants counter that certain key defects were present in the complaint, any of which would be a sufficient reason for the court to dismiss the claim.

Plaintiff points to an allegation in her complaint that those defendants who manufactured or supplied GM with vinyl chloride products published a fact sheet, entitled "SD-56," which was allegedly supposed to provide GM with information about the risks associated with vinyl chloride, which GM would then use to educate its employees. Plaintiff further alleged that in SD-56, defendants deliberately misstated that 500 parts per million (ppm) was a safe exposure limit, without scientific data to support that statement, and that defendants claimed in SD-56 that the only known systemic effect of exposure to vinyl chloride was a "mild general anesthetic," despite their knowledge of studies showing that exposure to animals and humans could result in liver damage. Defendants do not directly dispute plaintiff's claims, but argue instead that any false information contained in SD-56 was provided to decedent's employer, not to decedent himself, and thus, plaintiff could not prove that he was the victim of a fraud.

Plaintiff cites *Opperhuizen v Wennersten*, 2 Mich App 288; 139 NW2d 765 (1966) as authority for this type of claimed third party fraud. In *Opperhuizen*, the plaintiff purchased an automobile from the defendant, who had purchased it from a third party, Veneklasen. *Id.* at 292. Veneklasen knew that the automobile had been stolen, but sold it to Wennersten without revealing this fact. *Id.* After the car was repossessed by the FBI (Federal Bureau of Investigation) for its original owner, the plaintiff sued Wennersten. *Opperhuizen*, *supra* at 291. The court found that Veneklasen could be held liable for fraud because he "set the whole sequence of events in operation knowing that Wennersten was in the business of repairing and selling cars having dealt with him on that basis for nine months. It was foreseeable that someone beyond Wennersten would be hurt if the true facts were discovered concerning the [automobile]." *Id.* at 292-293. A panel of this Court agreed that such a conclusion validated the connection or relationship between the parties necessary to hold Veneklasen responsible to the plaintiff for his damages suffered by reason of the fraud. *Id.* at 295. This Court specifically held that:

> While some connection, direct or indirect, between a party charged with making false representations and a party relying thereon must be shown, it is not essential, in support of a cause of action for damages resulting from false representations, that the false representations be shown to have been made directly to the party claiming to have relied upon them. It has been repeatedly held that where a party makes false representations to another with the intent or knowledge that they be exhibited or repeated to a third party for the purpose of deceiving him, the third

> party, if so deceived to his injury, can maintain an action in tort against the party making the false statements for the damages resulting from the fraud. [*Id.* at 294 (citation and quotation marks omitted).]

Importantly, the Court's statement in favor of allowing a third party to prevail on a claim of fraud involved a situation where the Court determined that the third party would be directly affected by the action of the party who committed the fraud.

In the instant case, decedent was not a consumer of the false information allegedly provided by defendants. His employer, GM, was allegedly defendants' customer and received the information provided by defendants. There is no allegation whether the decedent ever saw the document, or whether defendants intended for it to serve as an educational tool for their customers' employees. It is thus not clear that decedent was directly harmed as a result of defendants' alleged fraud. Under the reasoning of *Oppenhuizen*, it may appear logical for plaintiff to assume that defendants had reason to suppose that customers like GM would provide information to their employees based on the information with which they had been provided by the manufacturer. Some of the cases cited by plaintiff which have been decided since *Oppenhuizen*, however, cast doubt on this assumption.

Cormack v American Underwriters Corp, 94 Mich App 379; 288 NW2d 634 (1979), supports the idea that plaintiffs may recover on their fraud claims from third parties in situations where they suffered a harm as a direct result of the third party's deception or misrepresentation. *Cormack* involved a plaintiff who asked his car salesman to secure insurance for his newly purchased car from Lloyds of London, the insurer of another automobile owned by the plaintiff in England. *Id.* at 381. The salesman spoke to a representative of the defendant's and asked him to extend coverage to the plaintiff's vehicle, and the representative responded that he had "taken care of" it. *Id.* at 381-382. The plaintiff's new car was subsequently stolen, and the plaintiff could not recover its value because the defendant had not actually insured it. *Id.* at 382. The Court permitted the plaintiff's recovery for fraudulent misrepresentation based on its earlier holding in *Oppenhuizen* and the fact that it was "undisputed that plaintiff acted in reliance on defendant's representation [to plaintiff's car salesman] that he was insured, with subsequent damage to him as a result thereof." *Cormack, supra* at 387. As in *Oppenhuizen*, the injury suffered by the plaintiff in *Cormack* was directly traceable to the third party's misrepresentation. In the instant case, the harm is less direct.

As defendants noted, plaintiff did not allege that GM provided its employees with SD-56, only that defendants published the document with the intent that GM do so. Absent an allegation that GM provided SD-56 to decedent, or at least that it provided decedent with the information contained therein, plaintiff's claim cannot satisfy the element of fraud requiring that the plaintiff justifiably relied on this misinformation. See *id.* at 385.

Also notable is this Court's statement in *Int'l Brotherhood of Electrical Workers v McNulty*, 214 Mich App 437, 447; 543 NW2d 25 (1995), that "[a]n allegation of fraud based on misrepresentations made to a third party does not constitute a valid fraud claim." Although there is no clear indication that *McNulty* overrules *Oppenhuizen* or *Cormack*, it is indicative of the special circumstances that must exist in order to plead a successful fraud claim when the required

element of misrepresentation has been made to a third party. Therefore, the trial court did not err in dismissing this claim.

Next, plaintiff asserts that she alleged a valid claim of fraudulent concealment, which was improperly dismissed by the trial court. Our Supreme Court has stated that "[f]raudulent concealment means employment of artifice, planned to prevent inquiry or escape investigation, and mislead or hinder acquirement of information disclosing a right of action. The acts relied on must be of an affirmative character and fraudulent." *Buchanan v Kull*, 323 Mich 381, 387; 35 NW2d 351 (1949) (citation omitted). The elements of fraudulent concealment, also called "silent fraud," are the same as the elements to prove a claim of fraud at common law, which were set forth above. See *McMullen v Joldersma*, 174 Mich App 207, 213; 435 NW2d 428 (1988), quoting *Jaffa v Shackett*, 114 Mich App 626, 640-641; 319 NW2d 604 (1982). For purposes of fraudulent misrepresentation, a misrepresentation of fact may be shown where the defendant had a duty to disclose facts but suppressed them instead. *Boumelhem v Bic Corp*, 211 Mich App 175, 184-185; 535 NW2d 574 (1995). A legal duty to disclose commonly arises from a circumstance in which the plaintiff inquires regarding something, to which the defendant makes a false or misleading representation by replying incompletely with answers that are truthful but omit material information. *The Mable Cleary Trust v The Edward-Marlah Muzyl Trust*, 262 Mich App 485, 500; 686 NW2d 770 (2004).

According to plaintiff, her allegations that defendants knew that vinyl chloride caused liver injuries, that residual vinyl chloride monomer could cause cancer in workers, and that vinyl chloride was generally "unsafe" for workers were all allegations of material misrepresentations and that defendants had a duty to warn decedent of the dangers of the vinyl chloride contained in their products. Plaintiff's argument that SD-56 contained material misrepresentations relies on her previous argument that a fraud perpetrated on GM as defendants' customer and decedent's employer constituted a fraud upon decedent as an employee and end user of defendants' vinyl chloride products. Although there is no question that plaintiff and plaintiff's decedent suffered a grave harm, it is not, as previously stated, directly traceable to defendant's alleged fraud in issuing SD-56 and allegedly making incorrect or false statements therein.

With respect to an affirmative duty to disclose, plaintiff cites to the principle of the law that the manufacturer of a product has a duty to warn the user of known dangers inherent in the use of the product. However, this duty, as defined, is generally applied in negligence or products liability claims—not a claim for fraudulent concealment. See, e.g., *Moning v Alfono*, 400 Mich 425; 254 NW2d 759 (1977); *Comstock v General Motors Corp*, 358 Mich 163; 99 NW2d 627 (1959); *Glittenberg v Doughboy Recreational Industries*, 441 Mich 379, 389; 491 NW2d 208 (1992)("A duty is imposed on a manufacturer or seller to warn under negligence principles summarized in § 388 of 2 Restatement Torts, 2d, pp. 300-301.").

Moreover, decedent was admittedly not party to the underlying business transactions wherein products containing vinyl chloride were purchased. In the complaint, plaintiff fails to state how defendants intended decedent to act or refrain from acting based upon their representations and the complaint does not indicate any reliance on a specific representation made by defendant. Plaintiff can only allege a general reliance, based solely on information sources promulgated throughout the industry. Dismissal of plaintiff's fraudulent concealment claim was thus appropriate.

Lastly, plaintiff claims that she was entitled to exemplary damages. We disagree because "[i]t is well settled that exemplary damages are not recoverable in a wrongful death action." *Tobin v Providence Hosp,* 244 Mich App 626, 638; 624 NW2d 548 (2001).

We reverse the trial court's grant of summary disposition to defendants as to plaintiff's product liability claims against the manufacturer/supplier defendants, affirm the grant of summary disposition as to plaintiff's other claims, and remand this case for further appropriate proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto

I concur in result only.

/s/ Pat M. Donofrio